Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

In re LAWRENCE B. SMITH,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THE HONORABLE JOHN O. NEWMAN, CHIEF CIRCUIT JUDGE, THE HONORABLE RALPH K. WINTER, CIRCUIT JUDGE, THE HONORABLE DENNIS G. JACOBS, CIRCUIT JUDGE; THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, AND THE HONORABLE THOMAS J. MCAVOY, CHIEF DISTRICT JUDGE

PETITION FOR AN EXTRAORDINARY WRIT (MANDAMUS)

LAWRENCE B. SMITH
3938 E. GRANT RD., #191
TUCSON, ARIZONA 85712
602/326-0283

PETITIONER PRO SE

OCTOBER, 1994

40 pp

QUESTIONS PRESENTED

1. Having remanded a Rule 11 sanction award to the district court for reconsideration pursuant to the Supreme Court's mandate that the new Rule 11 be applied to pending cases, may a United States court of appeals, and United States district court, restrict that consideration to whether use of the term "may," rather than "shall," would change the district court's original ruling, as opposed to giving the lawyer sanctioned the full benefit of the new rule, especially when all that counsel had done was file a complaint and the original district court award failed to address each individual count therein, much less, explain why no reasonable argument could be made in its behalf?

2. Is not sanctioned counsel also entitled to have the district court weigh the equities involved in his financial condition against the fact that only a complaint was filed?

[Second Circuit Docket No. 93-6093]

v.

SAMUEL K. SKINNER, Secretary, Department of Transportation; JAMES B. BUSEY, IV, Administrator, FAA; C. DEAN MCGRATH, JR., Acting General Counsel, Department of Transportation; NEIL R. EISNER, Assistant General Counsel, Department of Transportation; KENNETH P. QUINN, Chief Counsel, FAA; GREGORY S. WALDEN, Former Chief Counsel, FAA; DANIEL D. CAMPBELL, General Counsel, National Transportation Safety Board; JOHN M. STUHLDREHER, Former General Counsel, National Transportation Safety Board; JOHN H. CASSADY, Deputy Chief Counsel, FAA; DONALD P. BYRNE, Assistant Chief Counsel, FAA; PETER J. LYNCH, Lawyer, FAA; MARDI R. THOMPSON, Lawyer, FAA; KAREN R. BURY, Lawyer, FAA; JOSEPH A. CONTE, lawyer, FAA; HARRY S. GOLD, Lawyer, FAA; LORRETTA E. ALKALAY, Assistant Chief Counsel, FAA; RANDY E. HYMAN, Lawyer, FAA; BRUNHILDA SANDERS-LANE, Lawyer, FAA; DANIEL J. PETERSON, Regional Director, FAA; THOMAS ACCARDI, Official, FAA; NICHOLAS A. SABATINI, Official, FAA; CHARLES G. O'NEILL, official, FAA; ROY E. JOHNSEN, Former Official, FAA; MARINUS "RENE" KOCH, Inspector, FAA; STEPHEN W. SMITH, Inspector, FAA; MARTIN J. INGRAM, Inspector, FAA; ROBERT E. MARTIN, Official, FAA; GEORGE MURGITROYDE, Official, FAA; MARC PANDELOGLOU, Official, FAA; ROBERT D. MURCHLAND, Inspector, FAA; EDWARD HARAHUSH, Inspector, FAA.

[Second Circuit Docket 93-6297]

v.

UNITED STATES OF AMERICA

[Cases consolidated on appeal.]

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602/326-0283

PETITIONER PRO SE

OCTOBER, 1994

Petitioner Lawrence B. Smith prays that a writ of mandamus issue to the United States Court of Appeals for the Second Circuit, and the Honorable John O. Newman, Chief Circuit Judge, the Honorable Ralph K. Winter, Circuit Judge, the Honorable Dennis G. Jacobs, Circuit Judge, and the United States District Court for the Northern District of New York, and the Honorable Thomas J. McAvoy, Chief District Judge, on the grounds and for the reasons hereinafter set forth.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit which is the principal subject of this petition is reproduced at page a-1 (appendix), and reported at 999 F.2d 708 (2nd Cir. 1993). It consolidates the appeals of two Fed.R.Civ.P.11 sanction actions against petitioner. The relevant district court orders are reproduced in the appendix at a-

26, a-37, a-40, a-41, a-51 and a-53. The district court orders rendered after remand by the Second Cicruit are at a-186 and a-188. The first of the sanction cases is reported as *Knipe v. Skinner*, 146 F.R.D. 58 (N.D.N.Y. 1993); the second, *Knipe v. United States*, 151 F.R.D. 24 (N.D.N.Y. 1993).

JURISDICTION

Jurisdiction of the United States District Court, Northern District of New York in *Knipe v. Skinner*, a so-called *Bivens* constitutional rights violation case,[1] was pursuant to 28 U.S.C. § 1331; jurisdiction of *Knipe v. United States*, was pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. & 1346(b).

Jurisdiction of the United States Court of Appeals for the Second Circuit of both cases was pursuant to 28 U.S.C. § 1291 and

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[1] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Fed.R.App.P.3.

Jurisdiction of a petition for an extraordinary writ (mandamus) in the Supreme Court is pursuant to 28 U.S.C. § 1651(a). Should the Court treat this as a petition for a writ of certiorari, jurisdiction may be invoked pursuant to 28 U.S.C. § 1254(1). An order, No. A-68, extending time to file such a petition to October 16, 1994, is dated July 29, 1994.

STATUTES INVOLVED

No statutes, other than 28 U.S.C. § 1651, are relevant to the issues raised herein. Relevant, however, are this Court's Order of April 22, 1993, regarding implementation of amendments to the Federal Rules of Civil Procedure, the new Fed.R.Civ.P.11 (1993); and the old Fed.R.Civ.P.11 (1983).

STATEMENT OF THE CASE

Petitioner, as counsel for Richard X. Knipe, Glenn A. Valentine and Bernard C.

Ford, initiated on their behalf as joint plaintiffs both a *Bivens* action and an FTCA action. In hindsight, it would have been preferable to have initiated separate complaints for each person, but all the allegations arose basically from the same set of circumstances. These are set out in detail in the complaints which are reproduced in the appendix: *Bivens* at a-54, FTCA at a-114. A shorter statement is contained in the FTCA case presently before the Court in *Knipe v. United States*, No. 94-424. The issue there is subject matter jurisdiction. The case involves a direct conflict between circuits. And, as noted in the Supplemental Brief recently filed, the conflict has been further sharpened because of the decision in *Mace v. Skinner*, No. 92-17014, slip op. at 10487 (9th Cir. Sept. 6, 1994) (WESTLAW 1994 WL476730). The Ninth Circuit in a carefully reasoned and lengthy opinion of national significance has held

that United States district courts do in fact have subject matter jurisdiction of challenges to Federal Aviation Administration (FAA) enforcement practices even though by virtue of 49 U.S.C. app. § 1486 courts of appeals have jurisdiction over FAA enforcement orders. Although a *Bivens* action, the decision's rationale applies equally to FTCA cases. *Mace* is one of petitioner's cases, and of the same series of which the instant *Knipe* cases are part, with many identical issues.[2]

At this point, however, the basic problem at the center of this petition for mandamus is that neither Justice Department counsel, who represent the individual *Bivens* defendants and, of course, the

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[2] Recently during oral argument before the Tenth Circuit, one judge posed the question of how it would make sense to sanction a lawyer for a frivolous complaint when another circuit (*Mace*) was returning a similar complaint to district court where it would receive thorough consideration.

United States, nor district and appeals court, ever deal with the specific counts in the complaint, whether case-in-chief, or motion for sanctions. Even though the counts in the complaints are carefully prepared and segregated from one another, so that should one fall it does pull down another, both defense counsel and courts have painted all allegations with the same brush. Nor, while awarding sanctions, which total $16,252.89 ($9,000.00 plus $7,252.89, plus interest), did the district court give the slightest consideration into the equity of such huge fines in regard to counsel's resources.

Petitioner has a net worth of about minus $24,000, a result of the public interest work he has been pursuing now for fifteen years. At age 65, if such debts stand it will mean bankruptcy. Which would be truly ironic, since neither Justice Department counsel nor any court has ever

pointed to any language in the United States Code, Code of Federal Regulation, Federal Register, or legislative history that even hints at a connection between airsafety violations and suspension or revocation of a pilot's license as a penalty — or for any other reason.

Petitioner of course appealed both sanction awards. They were consolidated by the appeals court. During oral argument Justice Department counsel suggested to the court that in accordance with the Supreme Court Order of April 22, 1993, it remand the sanction cases to the district court. Justice Department counsel, however, urged the court to limit consideration during remand to whether the district court might change its mind since the new rule stated that the district court "may" award sanctions, whereas, the old rule, with the term "shall," made a sanction mandatory if warrranted.

The problem is that such referral, given the huge size of the sanctions, was meaningless. Had a sanction been a token hundred dollars or so, a court might remove it. Most importantly, there was no lawful basis to restrict application of the new Rule 11. By doing so the Second Circuit denied petitioner the two most critical provisions of the new Rule: (1) need for careful legal analysis of each count; (2) consideration of the equity of any award in regard to counsel's resources, and whether all, or only one or two counts deserved sanction.

(It should be noted that neither of these concepts are new ideas, but based on established precedent — not to mention obvious concepts of due process.)

I. JUSTIFICATION FOR MANDAMUS

A. In aid of appellate jurisdiction —

Petitioner would be the first to concede that a petition for a writ of certiorari

could be filed pursuant to 28 U.S.C. § 1254(1). But this would only have made sense if the Second Circuit had refused to remand pursuant to the April 22, 1993 order. And even then a writ of mandamus would have made more sense. Were this Court to entertain a writ of certiorari it would have nothing more in the record than what is present. And petitioner would be effectively denied any opportunity to show that none of the carefully constructed counts in the complaints was in the least bit frivolous since there would be no lawyer-like argument upon which a court could make an intelligent decision.

Mandamus is clearly in aid of the Court's appellate jurisdiction, and if it instructs both the court of appeals and district court to give petitioner full benefit of the mandates of the new Rule 11, then a full record will be had to support careful appellate review of the critical

issue: that issue is only whether a reasonable argument can be made in behalf of the particular count or cause of action. Petitioner otherwise is left in a Kafkaesque position of not being able to defend against exactly what defendants (Justice Department counsel) say is frivolous about any given count.

Using this method, it is highly likely that no appeal from district court will ever be necessary and justice will be done.

B. Exceptional circumstances — Without relief here this attorney will be stuck with more than $16,000 in fines. But because of the use of the same techniques — deliberately failing to deal with individual counts, counsel faces similar fines which total over $40,000. How is any lawyer ever going to attack governmental misconduct (and if failing to have a statute, rule, statement in the Federal Register or legislative history for a

program that deprives persons of their right to make a living, we don't know the meaning of the word) when faced with such drastic fines and no way to defend himself? One million pilots and mechanics are active in aviation, according to FAA public information personnell in Oklahoma City. Who is going to try to protect their interests if one is disciplined for simply filing a complaint? The new Rule 11 has clearly been misused in this case. Granting a writ of mandamus here that simply instructs the lower courts to follow that rule, especially in regard to its two most important facets, dealing with each count, equity for the lawyer, will be of enormous precedential value to other courts, attorneys, and litigants.

C. No other adequate relief — The question may arise as to why petition does not seek a writ of mandamus from the Second Circuit. The reason: We did — in a twenty-

page Petition for Rehearing, to no avail. This was after the district court promptly filed its speedy response. See appendix a-186 and a-188.

D. Tainted decision — "Tainted" may be a rather strong term to describe an appeals court decision, and we apologize for using it, except the term fits. The Second Circuit in regard to the FTCA case said:

> In *Knipe v. United States*, 151 F.R.D. 24 (N.D.N.Y.) 1993), the district court imposed sanctions against Smith, concluding that in filing the complaint four days after dismissal of *Knipe v. Skinner*, Smith had "violated Rule 11 by interposing a pleading that has no good faith basis in the law for an improper purpose." *Id.* at 26. We hold that the district court's ruling that Smith violated Rule 11 was not an abuse of discretion.
>
> . . . .
>
> [R]easserting those arguments in a new complaint in a district court four days after that court has rejected those arguments in the context of the same factual circumstances affords grounds for finding that the new pleading was interposed for an improper purpose.

Appendix at a-19, a-21. All of this underscores the belief of the district court, affirmed by the Second Circuit, that

these lawsuits were a plot by plaintiffs' counsel. The fact both courts believe the FTCA timing reveals some sinister motive is the most unfounded accusation we ever hope to face as a lawyer. It colors the entire decision. What disturbs us is the ease with which Justice Department counsel were able to sell the idea it is somehow sinister to file one action later than the other. They know Congress has specifically recognized *Bivens* and FTCA compatibility. 28 U.S.C. § 2679(b)(1), makes a negligence action against the government the exclusive remedy. It bars action against the individual employee or his estate "whose act or omission gave rise to the claim." *Id.* In 1988, however, Congress amended this to exempt from that bar "a civil action against an employee of the Government--(A) which is brought for a violation of the Constitution of the United States . . ." 28 U.S.C.A. § 2679(b)(2)(A) (pocket part).

Thus by law, the actions are expressly compatible.

Since the district court specifically ruled no harassment was involved in the *Bivens* case, a-35, both courts are saying counsel should be punished because of *an accident of timing*. There are practical reasons for that. Once it is decided to take action on both theories of liability, the lawyer is faced with statute of limitations problems. The appeals court asks why the two complaints were not combined. ("Smith offered no reason why his theory of liability under the FTCA could not have been included in his first complaint . . ."). a-22. The actions require two different complaints because one is strictly a civil rights action against individual officials under the federal question statute, 28 U.S.C. § 1331; the other for governmental negligence, pursuant to 28 U.S.C. §§ 2671 et seq and 1346(b).

Generally a *Bivens* action has to be filed within the state statute of limitations for personal injury, usually two years. In the instant *Bivens* action that statute was about to run.

The problem of simultaneity is created because before one files an FTCA action he must first file a claim with the "appropriate Federal agency," 28 U.S.C. § 2675(a), and then cannot file a lawsuit until at least six months have passed, or the agency denies it, whichever comes first. *Id*. Even were there no statute of limitations problem, instead of twiddling one's thumbs, it makes sense to get the *Bivens* action underway while awaiting the six-months or so for the FTCA claim denial; then move to consolidate them for trial.

E. The new Rule 11 — In pertinent part, Rule 11 now provides:

> **(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion,

or other paper, an attorney or unrepreseented party is certifying that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, of specifically so identified, are like to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

(c) Sanctions. If after notice and a reasonable opportunity to respond, the court determines that that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and *shall describe the specific conduct alleged to violate*

subdivision (b). It shall be served as provided in Rule 5, but shall not be field with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn, or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order *describing the specific conduct that appears to violate subdivision (b)* and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule *shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.* Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directive of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and other expenses incurred as a direct result of the violation.

. . . .

> **(3) Order.** When imposing sanctions, *the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.*

Fed.R.Civ.P.11 (1993) (emphasis added). By order implementing the new Rule 11 and amendments to others, this court, *inter alia*, provided:

> 2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

Supreme Court Order of April 22, 1993.

F. Appeals court view of the rule — The Second Circuit:

> [W]e conclude that a just and practicable application of the amended Rule 11 requires that the district court be afforded an opportunity to exercise its discretion whether to impose sanctions under the amended version.
>
> However, on remand the district court should otherwise adhere to the version of Rule 11 in effect at the time of its prior decisions. ***Any further retroactive application of the amended Rule 11 would charge Smith with knowledge of a rule not in effect at the time of filing and therefore would not advance Rule 11's central goal of deterring baseless filings.***

a-24-25 (emphasis added). The italicized statement, in our view, is unintelligible.[3] Only two things matter in this case: (1) the need to direct argument to specific counts; (2) the question of equity. Neither is a new idea.

In providing an interpretation of the new Rule, Fed.R.Civ.P.11(c)(2), the Advisory Committee (whose notes are virtually part of it) instructed that one consideration was "what amount, given the financial resources of the responsible person, is needed to deter that person from

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[3] ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule involved. . . . ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him]. . . ." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).

repetition in the same case . . . subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct . . ." 2A Moore's Federal Practice ¶ 11.01[9], p. 72 (Cum.Supp. 1993-1994). (Bankruptcy would certainly be an efficient deterrent.) The ability to pay is not a new idea. "One equitable consideration . . . is the sanctioned attorney's (or party's) assets." *Brown v. Federation of State Medical Boards of U.S.*, 830 F.2d 1429, 1439 (7th Cir. 1987). "As we have stated, 'fee awards are an equitable matter, thereby permitting the district court to consider the relative wealth of the parties. [Citing case.]" *Id.* at 1440. How would it not be "just and practicable" for the District Court to take a look at our financial condition?

G. Penalty to be paid into court: -- Explaining the basis for Fed.R.Civ.P.

11(c)2), the Advisory Committee writes:

> Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, *it should ordinarily be paid into court as a penalty*. However, under *unusual circumstances* . . . some or all of this payment may be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorney's fees for the services directly and unavoidably caused by the violation of the certification requirement, *If, for example, a wholly unsupportable count were included in a multi-count complaint* or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expense should be *limited to those directly caused by the inclusion of the improper count, and not those directly resulting from the filing of the complaint or answer*. . . . Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having *modest financial resources*. . . .

2A Moore's Federal Practice ¶ 11.01[9], p. 72-73 (Cum.Supp. 1993-1994) (emphasis added). All this attorney has done is file two complaints. Are we not entitled to know what are the "unusual circumstances" and

needless expenses that require such an enormous fine. The government is hardly impecunious. Why would it not be just and equitable to consider that? Which leads us into the next requirement of the new rule, not to mention due process:

H. Specificity — While the question of financial ability is terribly important, of greater importance is the issue of specificity. It is upon this ground that this Court should remand the case and instruct the Second Circuit to remand to the district court lower court with instructions to deal with each specific count in the complaints.

Specificity is not a new concept this attorney had no right to rely on before the amended Rule 11 took effect. It is a basic concept of due process. Neither in these nor any other cases-in-chief in the series has Justice Department counsel ever taken the issues count by count, allegation by

allegation, and dealt with them. Never have they taken one, quoted its language to indicate they understood what it was complaining of, then brought in a similar case and explained how its factual and legal conclusions were relevant. Not to mention that it is a huge leap from saying a claim is not legally well-founded to saying it is so frivolous that the plaintiff's lawyer should be punished. The fact is that all defense counsel have ever done is cite some cases, make a generalized statement, then, using the paragraph symbol ("¶"), make a list of paragraph numbers, sometimes a half-dozen or more. Their purpose is not to guide the court, but to leave it to flounder around on its own with an issue, and deprive the plaintiff of an opportunity to focus on it.

The burden of proof, so to speak, is on the party who moves for sanctions. Justice Department counsel never offered any legal

support for the harassment claim. The law is clear as to who bears the burden: "To recover fees based upon the provisions of Rule 11, as amended in 1983, a party need show that his opponent's actions were unfounded in light of the law as it might develop and in light of supporting facts which might be established." *Weir v. Lehman Newspapers, Inc.*, 105 F.R.D. 574, 575 (D. Colo. 1985).

The concept of specificity is not new. Without it, one is left in the Kafkaesque position of not really being able to defend himself. "This is the first case in which we have participated where sanctions were imposed when the complaint asserted a mix of frivolous and non frivolous claims." *Dodd Ins. Services v. Royal Ins. Co. of America*, 935 F.2d 1152, 1159 (10th Cir. 1991).

> We hold that a pleading containing both frivolous and nonfrivolous claims may violate Rule 11. . . . The presence of a single frivolous or groundless claim,

however, may not always mandate Rule 11 sanctions. For example, a frivolous claim easily disposed of by the opposing party and the court might not warrant sanctions. *Id.* at 1158. The complaints in the instant case were "easily disposed" of by way of motion to dismiss. Concurring:

> [H]ere we conclude that the district court did not provide adequate specificity in the award of sanctions. In light of the need for this court to again remand for more particular findings, we request that in cases involving substantial awards a district judge state with some specificity the reasons for the imposition of a sanctions, and the manner in which the sanction was computed.

Brown v. Federation of State Medical Boards of U.S., 830 F.2d 1429, 1438 (7th Cir. 1987). It was important "whether discovery would have been beneficial to the development of the underlying facts." *Id.* at 1435. "Due to the impact sanctions may have on a party or an attorney's career and personal well-being, sanctions should not be lightly imposed. [Citing case.]" *Id.* at 1437. Clearly, prompted by such cases, the new rule provides:

(1)(A) A motion for sanctions under this rule shall be made separately from other motions or requests *and shall describe the specific conduct alleged to violate subdivision (b)*.

(1)(B) On its own initiative, the court may enter an order *describing the specific conduct* that appears to violate subdivision (b) . . .

. . . .

(3) When imposing sanction, the court *shall describe the conduct determined to constitute a violation* of this rule and *explain the basis* for the sanction imposed.

Fed.R.Civ.P.11(c)(1)(A), (1)(B), and (3) (emphasis added). It was important to the Committee "Whether the improper conduct . . . infected the entire pleading, *or only one particular count* or defense . . ." 2A Moore's Federal Practice ¶ 11.01[9], p. 72 (Cum.Supp. 1993-1994) (emphasis added). "To stress the seriousness of a motion for sanctions and *to define precisely the conduct* claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion." *Id.* at 11.01[9], p. 74 (emphasis added).

As indicated, Appellant has been

afforded no specificity by defense counsel, trial court, or appeals court. The problem is that Justice Department counsel have been able to sell the idea the there is one basic issue: whether the FAA has statutory authority to suspend or revoke a license as a penalty for a safety violation. In its opinion the Second Circuit makes the following comments, which we provide as samples:

> [N]o good faith argument was advanced in support of the claims asserted in plaintiff's complaint. (a-13) **[Which claims?]**

> [P]laintiffs' complaint repeatedly alleged that FAA officials lack authority to commence certificate actions against alleged FAR violators, rather than impose civil money penalties. (a-14) **[In regard to which counts?]**

> In light of *Go Leasing's* affirmance of the validity of the FAA enforcement procedures challenges by plaintiffs, Smith cannot credibly argue that appellees could reasonable have known in 1988 that their conduct violated clearly established constitutional rights. (a-14) **[In regard to what conduct spelled out in what count?]**

Smith offers no authority demonstrating

> that appellee's alleged conduct would violate any clearly established constitutional right. (a-17-18) **[In regard to what conduct?]**

For the sake of a few examples to support the need for specificity, we confine ourselves to the FTCA complaint, *Knipe v. USA,* No. 93-6297. It needs to be understood that there are really three individual lawsuits in each complaint. Had we been prescient and foreseen this Rule 11 turmoil, we would have filed three separate actions. We can only summarize here.

Mr. Knipe: Two inspectors performed a base inspection of Mall Airways, but although requested to state what they found wrong, declined to say. a-120. This refusal violated a specific section of the Federal Aviation Act and must be taken as true. a-140. Where is an argument by defense counsel that federal officials can violate their agency's charter and it not either be a violation of due process or negligence? Two weeks later one inspector came back as

leader of a special inspection team and presented Mall Airways with a complaint about emergency crew training, a matter which he knew about months earlier. Yet it was so much a threat to safety he threatened emergency action to shut down the operation. a-125, a-129, a-130. Rather than argue, Mr. Knipe brought all his pilots back and gave them the hands-on training the inspector was complaining about, although the company had been using a videotape with FAA permission for six years.

Even though Mall corrected the only thing complained of that was asserted to create an emergency situation, FAA lawyers, under threat of an emergency order of revocation of Mall's operating certificate, kept the company shut down. The charge is that FAA officials violated the agency "rule" on when to use the emergency power. a-143. Where is an argument by defense

counsel that a reasonable argument cannot be made that the violation of an agency's own rules is a violation of due process, or that the officials had discretion to violate their own rules?

Mr. Valentine: FAA officials coerced Mall Airways into firing Mr. Valentine from his management position. a-128. This was without any authority, and violated the specific provisions of the only rule that had some relevance. Where is an argument by defense counsel that no reasonable argument can be made that this violated Mr. Valentine's right to due process? Ditto, for charging him with violating a non-existent rule. a-150. Ditto, for seeking to take his pilot's license as punishment for a bookkeeping non-rule that related to his "license" to be a director of operations but had no relationship to his pilot's license which authorized him to fly commercial aircraft. a-151. Is it really

the position of both district and appeals court that no reasonable argument can be made that FAA officials had no authority to blacklist the three plaintiffs and that such violated their right to due process?

Mr. Ford: The charge is that the license penalty sought against Mr. Ford was a penalty created by the executive branch of government. a-156. As noted several times here and in all our pleadings, this is the central issue concerning punitive suspensions. Where is an argument by defense counsel that no reasonable argument can be made in support of this charge? Justice Department counsel have *never* even acknowledged this charge in some three dozen pleadings and briefs.

CONCLUSION

For the foregoing reasons, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the United States

Court of Appeals for the Second Circuit, the Honorable John O. Newman, Chief Circuit Judge, The Honorable Ralph K. Winter, Circuit Judge, the Honorable Dennis G. Jacobs, Circuit Judge, the United States District Court for the Northern District of New York and the Honorable Thomas J. McAvoy, Chief District Judge, requiring the aforesaid judges to show cause on a day fixed by this Court why mandamus should not issue from this Court directing said Honorable Judges to vacate their judgment of March 3, 1994, and remand *Knipe v. Skinner, Lawrence B. Smith, Appellant,* No. 93-6093, and *Knipe v. United States, Lawrence B. Smith, Appellant*, No. 93-6297, to the United States District Court for the Northern District of New York with the following instructions:

(1) That in the Rule 11 sanction actions involving Lawrence B. Smith, counsel for plaintiffs, the full provisions of

Fed.R.Civ.P.11 (1993) be applied to the sanction issue, with special attention to having arguments and making orders regarding each count in the complaints; and

(2) That in the event sanctions are found to be warranted the district court give careful consideration to the equities involved and the financial assets and abilities of Mr. Smith.

(3) That petitioner may have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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Lawrence B. Smith
Petitioner, Pro Se